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BP Products North America, Inc., and
7 BP Corporation North America, Inc.,
and ConocoPhillips Company
8

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 MARIA BARROUS, an individual and as)
Trustee of the Barrous Living Trust,)
12 DEMETROIS BARROUS, an individual,)
dba Jimmy's Restaurant,)

13)
14 Plaintiffs,)
15 vs.)

16 BP P.L.C., BP EXPLORATION AND OIL,)
INC., BP PRODUCTS NORTH AMERICA,)
17 INC., BP CORPORATION NORTH)
AMERICA, INC., CONOCOPHILLIPS)
COMPANY and DOES 1-20, inclusive,)

18)
19 Defendants.)
20

Case No. C 10-02944 LHK

DEFENDANT CONOCOPHILLIPS
COMPANY'S NOTICE OF MOTION
AND MOTION TO COMPEL FURTHER
DISCOVERY RESPONSES AND
PRODUCTION OF DOCUMENTS
AGAINST PLAINTIFFS

Date: April 12, 2011
Time: 10:00 a.m.
Place: Courtroom 5, 4th Floor
Judge: Hon. Paul S. Grewel

21 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE THAT on April 12, 2011 at 10:00 a.m., or as soon thereafter as
23 the matter may be heard, before the Honorable Paul S. Grewel, Defendant ConocoPhillips
24 Company ("COP") will bring on for hearing this motion to compel further discovery responses
25 and production of documents by Plaintiffs. This motion is made pursuant to Federal Rule of
26 Civil Procedure, Rule 37(a) on the ground that COP served proper requests for production of
27 documents on Plaintiffs, but Plaintiffs refused to provide responsive documents. The motion is
28 based upon this Notice of Motion and Motion to Dismiss, the accompanying Memorandum of

1 Points and Authorities, the Separate Statement of Disputed Issues pursuant to Local Rule 37-2,
2 the pleadings on file in this matter, the Declaration of Jonathan A. Eldredge and such other
3 matter as may be presented in reply or at hearing or of which the Court may take judicial notice.

4 Dated: March 7, 2011

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8
9 By /s/ Jonathan A. Eldredge
10 Attorneys for Defendants
11 BP P.L.C., BP Exploration and Oil, Inc.,
12 BP Products North America, Inc., and
13 BP Corporation North America, Inc. and
14 ConocoPhillips Company
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter arises from Defendants’ ongoing investigation and remediation of gasoline impacted groundwater and soil at a gasoline service station formerly owned by Defendants and Plaintiffs’ adjoining property. Plaintiffs claim up to \$10.5 million in damages, including diminution in property value, lost income and “lost opportunity damages.” They allege that the environmental condition of the property has prevented them from securing financing to redevelop their property.

Defendant ConocoPhillips Company (“COP”) sent document requests to Plaintiffs pertaining to the allegations of the first amended complaint. Plaintiffs refused to produce the following categories of documents:

1. Documents related to the formation of the plaintiff trust and its purchase of the property at issue in this matter. These documents are directly relevant to Plaintiffs’ specific factual allegations regarding the identity of the trustee and beneficiaries, the trust’s acquisition of the property and Plaintiffs’ standing to make the claims alleged.

2. Documents related to Plaintiffs’ financial condition, including income generated from the property at issue and financial records that are required to seek financing. These are directly relevant to Plaintiffs’ claim of lost income and their allegation that the environmental condition of the property alone prevented them from refinancing the property.

3. Documents related to the valuation of and loan documents for the restaurant Plaintiffs own and operate on the property. Such documents are directly relevant to Plaintiffs’ claim that their property has diminished in value.

As shown more fully below, COP’s requests were all specifically tailored and reasonably calculated to lead to the discovery of admissible evidence. Moreover, Defendants have executed a Northern District standard form protective order that would assure the confidentiality of the requested records. Because the documents are relevant to the litigation and no privilege prevents their disclosure, the Court should order Plaintiffs to produce the documents. Further, COP is entitled to reimbursement of the attorneys’ fees and costs incurred for this motion.

1 II. FACTUAL BACKGROUND

2 A. Plaintiffs' Damage Claims

3 According to Plaintiffs' first amended complaint, the Barrous Living Trust (the "Trust")
 4 owns real property located at 222 West Capitol Expressway, San Jose, California (the "Jimmy's
 5 Property"). (Docket No. 34 at ¶ 1.) Plaintiff Maria Barrous is the trustee for the Trust, and
 6 Plaintiff Demetrios Barrous is a beneficiary of the trust. (*Id.*) At all relevant times, Maria and
 7 Demetrios have operated a restaurant named Jimmy's Restaurant on the Jimmy's Property. (*Id.*)

8 Defendants BP Exploration and Oil, Inc. (now BP Products North America, Inc.) and
 9 ConocoPhillips Company are former owners of a gasoline service station located at 3951 Snell
 10 Avenue in San Jose (the "Snell Property"). (Docket No. 34 at ¶¶ 7, 11.) After a gasoline release
 11 occurred at the Snell Property, which is adjacent to the Jimmy's Property, Defendants conducted
 12 environmental investigation and remediation at both the Snell Property and the Jimmy's
 13 Property. (*See id.*, ¶ 12, Exh. B.)

14 Plaintiffs allege that the contamination "has caused Plaintiff damages including
 15 preventing plaintiff from maximizing the value of its real property causing plaintiff millions of
 16 dollars in damage." (Docket No. 34 at ¶ 23.) Specifically, Plaintiffs are claiming damages of up
 17 to \$10.5 million dollars (excluding interest and punitive damages) as follows:

- 18 (1) "Lost opportunity damages for being unable to develop Plaintiffs' property to
 19 maximize the property's income earning potential because of the conduct
 20 alleged in the First Amended Complaint. Damages of approximately between
 \$2 million and \$4 million;"
- 21 (2) "Decreased value of the property because of the contamination and the
 22 conduct alleged in the First Amended Complaint. Damages of approximately
 between \$1.5 million and \$3.5 million;"
- 23 (3) "Restoration Costs for property to pre-contaminated state, including
 24 restoration of original landscaping. Damages of approximately between
 \$15,000 and \$2 million;" and
- 25 (4) "Discomfort and Annoyance Damages . . . in an amount to be determined by
 26 the jury, but Plaintiffs believe such an amount will be no less than \$1
 million."

27 (Declaration of Jonathan A. Eldredge ("Eldredge Decl."), Exh. A at 2.)

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For their alleged “lost opportunity damages,” Plaintiffs allege that they spoke to several lenders, including Bank of America, about financing the Jimmy’s Property. Plaintiffs allege, however, that when they disclosed that the property was contaminated, “Plaintiff was informed by all the lenders that they would not finance the project due to the contamination and its serious impact on the value of the collateral.” (Eldredge Decl., Exh. B at 19:12-15.)

B. COP’s Discovery Requests and Plaintiff’s Refusal to Provide Documents

On November 24, 2010, COP served identical Requests for Production of Documents on Maria Barrous, individually and as Trustee of the Barrous Living Trust, and Demetrios Barrous, individually and as dba Jimmy’s Restaurant. (*See* Eldredge Decl., Exhs. C1-C2.)

On January 11, 2011, Plaintiffs served identical responses to COP’s discovery requests. (*See* Eldredge Decl., Exhs. D1-D2.) With respect to COP’s Requests for Production of Documents Nos. 1-10, 12, 16-25, 28 and 30, Plaintiff refused to produce documents stating:

In order to determine whether Plaintiff will produce documents in response to this request, Plaintiff needs to understand the relevance of the documents sought as well as whether the documents sought can be narrowed, as well as whether an appropriate protective order may be reached to cover any produced material. Thus, Plaintiff’s counsel agrees to meet and confer with defense counsel with regard to this request and the need for a protective order.

(*Id.* at Nos. 1-10, 12, 16-25, 28 and 30.)

On January 28, 2011, COP’s counsel contacted Plaintiffs’ counsel by telephone concerning Plaintiffs’ responses to COP’s discovery requests. (Eldredge Decl., ¶ 6.) Plaintiffs’ counsel requested that COP’s counsel provide a letter regarding the relevance of the document requests. (*Id.*) On February 2, COP’s counsel sent a letter to Plaintiffs’ counsel addressing the relevance of each of the requests for documents, and also agreeing to maintain the confidentiality of the financial documents:

For the financial records, similar to the *Small* case, Defendants are willing to maintain the confidentiality of the documents, including a limitation that only Defendants’ attorneys, experts and other relevant witnesses may view the documents, that disclosure to third parties is prohibited, and that the documents will be destroyed after the lawsuit, including appeals, is concluded. Obviously, if you believe any additional protections are

necessary, we will be glad to confer further regarding the specific provisions of confidentiality.¹

(*Id.*, Exh. E.) Plaintiffs have refused to provide any documents in response to Request Nos. 1-10, 12, 16-25, 28 and 30. (*Id.*, ¶ 8 and Exhs. F-G.)

III. ARGUMENT

A. Legal Standard

“Under the Federal Rules of Civil Procedure, parties may obtain discovery on any nonprivileged matter that is relevant to any party’s claims or defenses, or ‘for good cause,’ discovery of any matter relevant to the subject matter involved in the action. [Citation.] ‘Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.’ [Citation.] District courts have broad discretion in resolving whether the information sought is relevant for discovery purposes. [Citation.]” *Aristocrat Technologies v. Int’l Game Technology*, Slip Copy 2009 WL 3573327 *1 (N.D. Cal. 2009).

“A party may make a motion for an order to compel a disclosure pursuant to Fed.R.Civ.P. 37(a)(1). The Federal Rules provide that an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond. [Citation.] Furthermore, parties are under a duty to provide discovery regarding those facts that they know about as well as those of which they reasonably ought to have been aware. [Citation.]” *Aristocrat*, 2009 WL 3573327 at * 1.

B. COP is Entitled to Production of the Trust Documents (RFP Nos. 1 and 3)

Request Nos. 1 and 3 request documents related to the formation of the Trust and when the Trust acquired the “Jimmy’s Property.” (*See* Eldredge Decl., Exhs. C1-C2.) Plaintiffs make specific allegations concerning the Trust in their first amended complaint, including the name of the trustee (Maria Barrous), ownership of the Jimmy’s Property and the Trust’s beneficiary (Demetrois Barrous). (*See* Docket No. 34 at ¶ 1.) Thus, the Trust documents are relevant to test those factual allegations. For example, the Trust could obtain damages only for the period of

¹ On February 18, the parties executed a Northern District standard form protective order, which was filed with the Court. (*See* Docket No. 42.)

time during which it has owned the Jimmy's Property. Without the requested documents, Defendants have no ability to verify when that period began.

Moreover, a trust can only maintain a lawsuit through its trustee, *see, e.g., Saks v. Damon Raike & Co.*, 7 Cal.App.4th 419, 427 (1992) ("At common law, where a cause of action is prosecuted on behalf of an express trust, the trustee is the real party in interest because the trustee has legal title to the cause."), and only the owner of the real property at the time it was damaged can sue for damage to the real property, *see, e.g., Krusi v. S.J. Amoroso Construction Co.*, 81 Cal.App.4th 995, 1005 (2000). Thus, the Trust documents are relevant to determine whether Maria Barrous is the trustee of the property, and whether the Trust actually owns the property at issue in this lawsuit (i.e., Jimmy's Property).

Further, the trust documents are relevant to Plaintiffs' damage claims. All valid express trusts must contain a "legal purpose," which delineates what the trust was created for, and trusts may include limitations on the trustee and beneficiaries' use of the trust res. *See, e.g., Estate of Johnston*, 47 Cal.2d 265, 270 (1956) ("To constitute a valid express trust, it is essential that there should be (1) a trustee, (2) an estate conveyed to him, (3) a beneficiary, (4) a legal purpose, and (5) a legal term."). If, for example, the trust documents proscribed the type of redevelopment Plaintiffs claim they intended to pursue, such would necessarily bar any claim against Defendants based on such plans. By refusing to produce the trust documents, Plaintiffs improperly seek to deprive Defendants of their right to make such a defense.

The proper formation of the Trust would also be a prerequisite for any financing of the Trust's property. Thus, the trust documents are relevant to determine what the trust res was to be used for and whether there were any limitations on the use of the trust res (e.g., limitations on redevelopment of the property or restrictions on burdening the property with debt) that could affect Plaintiffs' damage claims. Plaintiffs claim that the environmental contamination alone frustrated their ability to borrow against the property. Defendants have a right to defend the claim, and information regarding the trust purpose and limitations is plainly relevant.

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**C. COP is Entitled to Production of Plaintiffs' Financial Documents
(RFP Nos. 2, 4-10, 12 and 16-25)**

**1. The requested financial records are directly relevant to
Plaintiffs' alleged damages**

Request Nos. 2, 4-10 and 12 seek documents related to the Trust's financial condition from 1997 to the present, including tax, financial and accounting records, and income, disbursement, expenses, revenues and sales statements;² Request Nos. 12 and 16-20 seek documents related to Jimmy's Restaurant's income, profits, and expenses; and Request Nos. 21-25 seek documents related to Plaintiffs Maria and Demetrios Barrous' financial condition, including income generated from the Jimmy's Property and Jimmy's Restaurant. (*See* Eldredge Decl., Exh. C1-C2.) These documents are the foundation for Plaintiffs' damages claim, and thus, are relevant.

Initially, COP's document requests are relevant to show the amount of income that Plaintiffs generated from the Jimmy's Property and Jimmy's Restaurant during the relevant time period. (*See, e.g.*, Eldredge Decl., Exhs. C1-C2 at No. 12 ("all DOCUMENTS that RELATE TO any statement or summary of expenses, revenues, income and/or sales RELATED TO the TRUST, the JIMMY'S PROPERTY or JIMMY'S RESTAURANT.").) Based on Plaintiffs' complaint and discovery responses, it appears that Plaintiffs have continuously run Jimmy's Restaurant on the Jimmy's Property from 1997 to the present and they have received annual income from that venture. Nevertheless, they allege that they could have made more money had they been able to redevelop the property.

Defendants dispute that such a claim is actionable, but if it were, Plaintiffs' claim for lost *anticipated* revenue would necessarily be offset by the *actual* revenue realized during the period for which Plaintiffs seek damages. Thus, to determine Plaintiffs' alleged damages, the amount the Plaintiffs earned, or could have earned, from the property during the relevant time period must be subtracted from the amount Plaintiffs allegedly could have earned during the relevant

² The statute of limitations for property damage claims is three years. *See* Cal. Code of Civ. Proc., § 338(b). Plaintiffs executed a tolling agreement with B.P. Exploration & Oil, Inc. in 2000. (Docket No. 34, Exh. B.) Thus, COP sought records starting three years before the tolling agreement.

time period absent the alleged environmental contamination (e.g., through redevelopment). It is possible that Plaintiffs' proposed redevelopment would have been *less* profitable than the restaurant currently operated at the property, and in such an event Plaintiffs would not have even a theoretical loss. Thus, COP is entitled to Plaintiffs' financial documents that show the income generated from the Jimmy's Property, including from Jimmy's Restaurant, during the relevant time period.

Further, Plaintiffs' financial condition is relevant to Plaintiffs' allegation that they could have financed the property absent the alleged environmental contamination. Plaintiffs seek up to \$4 million due to their alleged inability to finance a redevelopment of the property. (*See* Eldredge Decl., Exh. A.) If the Plaintiffs' financial condition was such that a bank would not finance the redevelopment even were the property not the subject of an environmental cleanup, then the presence of the alleged environmental contamination is irrelevant and Plaintiffs' damage theory fails. Plaintiffs allegedly sought financing at Bank of America. (*See* Eldredge Decl., Exh. B at 19:5-7.) Bank of America's Conventional Loan Application for commercial borrowers requires, *inter alia*: (1) a business debt schedule, including the names of all creditors and an itemization of debts; (2) a personal financial statement from the business owners, including a list of all assets, liabilities, income, expenditures, securities, etc.; (3) a business financial statement, including assets, liabilities and income (including rental income); (4) the business' tax returns; and (5) the business owners' tax returns. (*See* Eldredge Decl., Exh. H.) These are the exact categories of documents that COP is seeking through its discovery requests, and thus they are directly relevant to Plaintiffs' damage theories and COP's defenses.

2. No privilege or privacy right permits Plaintiffs to withhold the requested records

Plaintiffs object to the disclosure of their financial documents on the basis of privacy. The objection is not well-grounded. "The concept of privacy is extended to financial privacy in litigation, but the privilege is subject to balancing the needs of the litigation with the sensitivity of the information/records sought. [Citations.]" *Davis v. Leal*, 43 Supp.2d 1102, 1110 (E.D. Cal. 1999). "Where there is no doubt that the information requested implicates traditional

1 notions of what is private information, e.g., associational records, the burden is on the requesting
 2 party to demonstrate that the information is directly relevant to the case, and that the information
 3 needs of the case outweigh the need for non-disclosure. [Citation.]” *Id.* at 1111. A “carefully
 4 drafted protective order” minimizes the impact of disclosure of private records. *See Sanchez v.*
 5 *City of San Jose*, 250 F.R.D. 468, 470 (N.D. Cal. 2008).

6 Here, COP does not dispute that Plaintiffs’ financial records are the subject of privacy
 7 concerns. However, as discussed, the documents are highly relevant to Plaintiffs’ damage
 8 claims—indeed, without Plaintiffs’ financial records, no expert witness would be able to opine
 9 on the ability of Plaintiffs to seek financing or the alleged amount of lost income. Further,
 10 because Plaintiffs have placed their finances at issue in this case by asserting lost income and
 11 claiming the inability to finance the property, the “needs of the case outweigh the need for non-
 12 disclosure.” *See, e.g., Small v. Travelers Property Casualty Company of America*, Slip Copy
 13 2010 WL 2523649 * 2 (S.D. Cal. 2010) (District Court compelled disclosure of tax returns to
 14 challenge plaintiff’s assertion of lost income). Finally, COP has agreed to treat the records as
 15 confidential (*see Eldredge Decl.*, Exh. E) and has executed the Northern District’s standard form
 16 protective order (*see Docket No. 42*). Thus, the impact on Plaintiffs’ privacy is minimal. COP
 17 seeks no more than what Plaintiffs have put at issue in this case. Were Plaintiffs permitted to
 18 withhold such information, they would effectively deprive Defendants of any opportunity to
 19 evaluate the claim of lost income.

20 Plaintiffs object to COP’s requests for Plaintiffs’ tax returns and records, Request Nos. 4,
 21 5 and 21, on the basis of the California tax return privilege. *See Weingarten v. Sup. Ct.*, 102
 22 Cal.App.4th 268, 274 (2002). The tax return privilege has exceptions: “[t]he privilege will not
 23 be upheld when (1) the circumstances indicate an intentional waiver of the privilege; (2) the
 24 gravamen of the lawsuit is inconsistent with the privilege; or (3) a public policy greater than that
 25 of the confidentiality of tax returns is involved. [Citation.]” *Id.*; *see also Small*, 2010 WL
 26 2523649 at * 1. Where the plaintiff places his economic condition at issue (e.g., by claiming lost
 27 income or profits), the tax return privilege is inapplicable. *See id.* at * 2 (“the gravamen of
 28 Plaintiffs’ damages claim is loss of income and profits from the destruction of his avocado trees

1 as a result of the fire.”); *Young v. United States* (S.D. Cal. 1993) 149 F.R.D. 199, 205 (“The
 2 government must be entitled to obtain discovery regarding Ms. Young’s income as reported to
 3 the Internal Revenue Service in order to evaluate and defend against her claim for lost wages.”);
 4 *Newson v. City of Oakland*, 37 Cal.App.3d 1050, 1055 (1974) (“The record indicates that
 5 Newson sought damages for loss of income . . .”).

6 Here, as discussed, Plaintiffs have alleged that they sought but were denied financing for
 7 the Jimmy’s Property—and that such denial was based solely on the environmental condition of
 8 the property. Indeed, Plaintiffs have disclosed as witnesses they intend to use in this case
 9 employees of the financial institution, including Bank of America, from which Plaintiffs
 10 allegedly sought financing. Among the primary documents financial institutions rely on to
 11 determine eligibility for financing are tax returns. (*See* Eldredge Decl., Exh. H (Bank of
 12 America loan application requires potential borrower to disclose tax returns for business and
 13 individual owners).) COP’s experts are entitled to view the same evidence the financial
 14 institutions—and their employees who are listed as witnesses in Plaintiffs’ initial disclosures—
 15 would have viewed to determine Plaintiffs’ eligibility for financing. Further, Plaintiffs are
 16 seeking lost income in this matter. Case law is clear that where lost income is claimed, the
 17 “assertion of the privilege is ‘inconsistent with the gravamen of [the] lawsuit.’” *Small*, 2010 WL
 18 2523649 at * 2. Thus, the limited tax return privilege does not bar disclosure.

19 Defendants have already entered into the Northern District’s standard form protective
 20 order. (*See* Docket No. 42.) Pursuant to *Small*, Defendants are willing to maintain the
 21 confidentiality of the documents, including a limitation that only Defendants’ attorneys, experts
 22 and other relevant witnesses may view the documents, that disclosure to third parties is
 23 prohibited, and that the documents will be destroyed after the lawsuit, including appeals, is
 24 concluded. *See Small*, 2010 WL 2523649 at * 3. Plaintiffs’ privacy and privilege objections are
 25 therefore improper. Defendants must have a legitimate opportunity to defend the substantial
 26 damage claims made against them.

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D. COP is Entitled to Production of the Valuation and Loan Documents (RFP Nos. 28 and 30)

Request Nos. 28 and 30 request documents related to appraisals, valuations and loan documents for Jimmy's Restaurant. Plaintiffs contend that as a result of Defendants' alleged contamination, Jimmy's Property decreased in value. (*See* Eldredge Decl., Exh. A.) Thus, documents related to the value of the property, including the developed Jimmy's Restaurant that is located on the property, are at issue and relevant. Further, loans for the Jimmy's Restaurant would affect the value of the property, and thus, are relevant to diminution in value. Finally, Plaintiffs have alleged in their discovery responses that Jimmy's Property was free and clear of loans and nothing was preventing them from financing the property. A loan on Jimmy's Restaurant, which likely would include the underlying real property as security, would obviously affect the value of the property, as well as Plaintiffs' ability to borrow additional funds, and thus, is relevant.

E. COP is Entitled to Reimbursement of its Attorneys' Fees and Costs

COP is entitled to its reasonable attorneys' fees and costs pursuant to F.R.C.P., Rule 37(a). Plaintiffs placed the documents discussed above at issue in this litigation through the allegations in the first amended complaint, and there was no legitimate basis for refusing to produce those documents. Moreover, Plaintiffs placed their financial condition at issue through their damage claims, including their lost income claim and their allegation that they were unable to finance the property. Thus, their claims of privacy and the tax return privilege do not support Plaintiffs' refusal to produce financial documents, especially in light of the executed protective order in this case.

There are many discovery disputes regarding which reasonable minds can differ. This is not such an instance. Where the party refusing to provide discovery does so without legitimate basis, the Rules mandate an award of reasonable expenses incurred by the party moving to compel. F.R.C.P., Rule 37(a)(5)(A). Accordingly, COP respectfully requests its reasonable attorneys' fees in the amount of \$6,022.50. (*See* Eldredge Decl., at ¶ 10.)

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1 **IV. CONCLUSION**

2 For the foregoing reasons COP respectfully submit the Court should grant this motion
3 and compel Plaintiffs to produce documents responsive to COP's requests.

4 Dated: March 7, 2011

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